UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RAELYNN BENHAM-DWYER,

Plaintiff,

v.

THE NEIMAN MARCUS GROUP LLC,

Defendant.

Case No. 24-cv-08643-JCS

ORDER GRANTING MOTION TO REMAND

Re: Dkt. No. 12

I. INTRODUCTION

On December 2, 2024, Defendant The Neiman Marcus Group LLC ("Neiman Marcus Group") removed this case from the San Francisco Superior Court on the basis of diversity jurisdiction under 28 U.S.C. §§ 1332, 1441 and 1446. Presently before the Court is Plaintiff's Motion for an Order Remanding Case to State Court Pursuant to 28 U.S.C. §1447(c) and Order to Set Aside the Stipulation ("Motion"). A hearing on the Motion was held on February 19, 2025. For the reasons stated below, the Motion is GRANTED.[1]

II. BACKGROUND

A. Factual Background

This is a personal injury case based on a May 19, 2023 accident that occurred in a Neiman Marcus store on Stockton Street, in San Francisco, California. Dkt. no. 1-1 (Compl.). Plaintiff filed a complaint in San Francisco Superior Court on July 9, 2024. A Statement of Damages filed with the complaint reflects that Plaintiff seeks $3 million in general damages and almost $2 million in special damages, including medical expenses and lost earnings. Dkt. no. 14-2

[1] The parties have consented to the jurisdiction of a United States magistrate judge pursuant to 28 U.S.C. § 636(c).

(Hernandez Decl., Ex. B).

Plaintiff's attorney's legal secretary, Maira Hernandez, "engaged ABC Legal Services on July 11, 2024, to effectuate service upon Defendant, Neiman Marcus Group LLC ([e]rroneously sued as 'Neiman Marcus' and 'NMG Holdings')." Dkt. no. 14 (Hernandez Decl.) ¶ 3. According to Hernandez, she "provided ABC Legal Services with the Summons, Complaint, Civil Case Cover Sheet, Notice of CM Hearing document, ADR packet, Statement of Damages for Neiman Marcus, and Statement of Damages for NMG Holdings." *Id.* She also searched the website of the California Secretary of State and determined that the agent for service of process for Neiman Marcus Group was 1505 Corporation CT Corporation System located at 330 N. Brand Blvd. Glendale, CA 91203 ("Brand Blvd. address"). *Id.* ¶ 4 & Ex. C (printout of search result).

According to a Proof of Service of Summons dated July 14, 2024 and signed by process server Jocelyn Ramos, the "Party to Serve" was "Neiman Marcus" care of its agent, 1505 Corporation CT Corporation System, at the Brand Blvd. address. Dkt. no. 14-4 (Hernandez Decl., Ex. D ("July 14 Proof of Service")). The process server checked the box for substitute service rather than personal service, stating that she left, *inter alia*, the complaint, summons and a statement of damages with Diana Ruiz, "an individual who identified themselves as the person authorized to accept with identity confirmed by subject reaching for docs when named." *Id.* The process server stated further that "[t]he individual accepted service with direct delivery. The individual appeared to be a brown-haired Hispanic female contact 35-45 years of age, 5'-5'4" tall and weighing 120-140 lbs." *Id.* The process server also mailed the papers to the agent for service of process at the Brand Street address, as required to effectuate substitute service. *Id.*

Hernandez received the proof of service on July 16, 2024 and contacted ABC Legal Services that day to ask whether the proof of service should have stated that the documents had been served by personal service rather than substitute service. Dkt. no. 14-4 (Hernandez Decl.) ¶ 5 & Ex. E. ABC Legal Services responded on July 18, 2024 that it had asked the process server to provide an amended proof of service correcting the error. *Id.* According to Hernandez, she "did not notify Plaintiff's counsel that the proof of substituted service incorrectly reflected substitute service or that it was being corrected because [she] took action to correct it 4 days after becoming

aware of the issue and thought it would be resolved quickly." *Id.* ¶ 6.

On October 15, 2024, at 9:34 a.m., Defendant's attorney, Mary Bevins, called Brian Yamada, an associate attorney at the Law Offices of Brian Nelson, which is representing Plaintiff. Dkt. no. 13 (Yamada Decl.) ¶ 5. At 11:16 am on the same date, Bevins sent an email to Plaintiff's attorney stating, "[w]e represent Neiman Marcus and would like 15 days to respond to the complaint. Please confirm this is acceptable." Dkt. no. 13-3 (Yamada Decl., Ex. 3) (October 15, 2024 email exchange). According to Yamada, he returned the call at approximately 3 pm and "stipulated to grant Defendant a 15 day extension of time to respond to the Complaint based on [the] erroneous proof of substitute service, which [he] sent to Ms. Bevins." Dkt. no. 13 (Yamada Decl.) ¶ 5. Yamada states that "[a]t that time, [he] was unaware that [his] secretary, Maira Hernandez, was conversing with ABC Legal to correct the erroneous proof of substitute service with a corrected proof of personal service." *Id.* In an email Yamada sent to Bevins the same day, he confirmed that he and Bevins "spoke today and that we agreed to grant a 15-day extension of time to respond to the Complaint." Dkt. no. 13-3 (Yamada Decl., Ex. 3) (October 15, 2024 email exchange).

In a December 27, 2024 meet and confer letter from Neiman Marcus Group to Plaintiff's counsel, attorney Mary Bevins stated that in the October 15, 2024 telephone conversation, Plaintiff's attorney:

> agreed that you provided our office proof of sub service confirming that proper service was not effectuated. However, you asked our office to enter an agreement and sign a notice of acknowledgment and receipt as it related to a wholly different entity, our client The Neiman Marcus Group LLC which would start the time limit to file a response to the Complaint. By signing the document, Defendant, The Neiman Marcus Group LLC (erroneously sued as "Neiman Marcus" and "NMG Holdings Company, Inc.") and counsel for the Plaintiff stipulated that the time to file a responsive pleading for this entity would start to run on or about December 2, 2024.
>
> . . .
>
> Plaintiff's counsel entered into a stipulation to have Neiman Marcus Group LLC enter an appearance as such, and waive any service of the complaint which may or may not have earlier happened.

Dkt. no. 13-5 (Yamada Decl., Ex. 5).[2]

On October 22, 2024, Hernandez followed up with ABC Legal Services, having still not received the corrected proof of service, and on November 5, 2024 a corrected proof of service, dated October 22, 2024 and reflecting that the papers had been personally served, arrived at the offices of Plaintiff's counsel. Dkt. no. 14 (Hernandez Decl.) ¶ 7 & Exs. E (email exchange), F ("October 22 Proof of Service"). It was not until December 17, 2024, however, that Plaintiff's attorney became aware of the October 22 Proof of Service. Dkt. no. 13 (Yamada Decl.) ¶ 7.

Also on October 22, 2024, Hernandez sent the Notice of Acknowledgment and Receipt. Notice of Removal, Ex. B. That form listed the correct defendant and stated that "[i]f you return this form to the sender, service of a summons is deemed complete on the day you sign the acknowledgment of receipt below." *Id.* Counsel for the Neiman Marcus Group signed the form on October 30, 2024. *Id.* The parties agreed at the motion hearing that as of that date (if not before), service was properly effected on the Neiman Marcus Group. They also stipulated that in none of their communications, whether written or oral, did they specifically discuss or enter into any explicit agreement relating to the deadline for removing the case to federal court.

Neither the July 14, 2024 Proof of Service nor the October 22, 2024 Proof of Service was filed in the state court action. Dkt. no. 14 (Hernandez Decl.) ¶ 9.

B. Contentions of the Parties

1. Motion

In the Motion, Plaintiff asserts, as a preliminary matter, that although the service papers were directed to "Neiman Marcus," and the Defendant's name is "Neiman Marcus Group, LLC", this was merely a harmless "misnomer" that should be overlooked because the proper defendant understood that it was being sued. Motion at 6-7 (citing *Kerr-McGee Chemical Corp. v. Superior Court*, 160 Cal.App.3d 594, 604 (1984); *Datskow v. Teledyne, Inc., Continental Products Div.*,

[2] At oral argument, the parties appeared to agree that their agreement relating to service actually occurred in a subsequent conversation approximately a week after the October 15 conversation. Attorney Brian Yamada conceded that in that conversation he expressed the opinion that the original service of the complaint, on July 12, 2024, was likely defective. Apparently, in that conversation Plaintiff's counsel also agreed to a request by Neiman Marcus Group extend the deadline to respond to December 2, 2024.

899 F.2d 1298, 1302-04 (2nd Cir. 1990)).

Plaintiff further asserts that the removal was untimely because the complaint and summons were served on July 12, 2024 and the thirty-day deadline under 28 U.S.C. § 1446(b) began to run at that point. *Id.* at 10-12. In support of this contention, Plaintiff asserts that Neiman Marcus Group knew at the time the complaint and summons were served on it that all of the requirements for diversity jurisdiction were met. *Id.* In particular, Plaintiff notes that Neiman Marcus Group knew its own citizenship (Delaware, where it is incorporated, or Dallas, Texas, where its principal place of business is located) and also knew from an incident report made to Neiman Marcus on the date of the accident that Plaintiff resides in Martinez, California. *Id.* at 11 (citing Notice of Removal and Declaration of Mary E. Bevins attached as Exhibit 2 Pg. 3, ¶6 and Pg. 7, ¶6 ("The incident report and medical records produced by Plaintiff confirmed that Plaintiff is a resident of California.")). At a minimum, Plaintiff contends, Neiman Marcus Group became aware that Plaintiff is a California resident when her attorney, on October 29, 2024, sent a demand letter with attached medical bills reflecting her address. *Id.* at 11; Yamada Decl., Ex. 6 (demand letter). Plaintiff also contends the amount in controversy was apparent from the time the complaint was served because of the statement of damages that was attached to the complaint reflected that more than $75,000 dollars was in controversy. Motion at 11 (citing Hernandez Decl., Ex. B).

Finally, Plaintiff asserts that she should be "relieved of the stipulation because of Plaintiff counsel's mistake, inadvertence, and mistake of fact which led him to enter into the stipulation." *Id.* at 13-15.

2. Opposition

In its Opposition, Neiman Marcus Group argues that the thirty-day "removal clock" did not begin running on July 12, 2024 because the "initial purported service was both irregular and confusing." Opposition at 2. Neiman Marcus Group further asserts that on October 15, 2024, the parties agreed that Neiman Marcus Group would have until December 2, 2024 to respond to the complaint. *Id.* at 3. According to Neiman Marcus Group, it "reasonably relied on the parties' clear stipulation that Defendant's responsive pleading—including removal—was due on December 2, 2024" and that stipulation should be enforced. *Id.* at 5.

Neiman Marcus Group argues that "Plaintiff cannot legitimately contend that the thirty-day period started to run from an earlier date when (1) no valid, conclusive proof of service existed then, (2) the recognized agent was misnamed or mislabeled, and (3) Plaintiff's counsel expressly requested that Defendant stipulate to an entirely new acknowledgment of service." *Id.* at 5-6. It further asserts that "[t]he Ninth Circuit's strict approach to removal timeliness does not require a defendant to anticipate or divine a correct service date in the face of contradictory proofs." *Id.* at 6 (citing *Harris v. Bankers Life & Cas. Co*., 425 F.3d 689, 694 (9th Cir. 2005)). According to Neiman Marcus Group, "[o]nly when a defendant receives a clear 'paper' that unequivocally reveals removability does the clock begin." *Id.* Neiman Marcus Group contends it did not receive a "clear paper" showing removability until the parties "sign[ed] the stipulation and Notice of Acknowledgment." *Id.* at 6.

Neiman Marcus Group also argues that the "misnomer" in naming Defendant "Neiman Marcus" rather than "The Neiman Marcus Group LLC" "[d]oes [n]ot [r]ender [r]emoval [u]ntimely or [d]effective." *Id.* at 7. Neiman Marcus Group "does not dispute that it is the proper entity. Rather, the crux is that, despite the minor misnomer, the initial proofs of service were patently unclear, causing Plaintiff to stipulate to a new, operative date." *Id.*

Finally, Neiman Marcus Group argues that it has established that all of the requirements of diversity jurisdiction are satisfied. *Id.* at 8.

3. Reply

In her Reply, Plaintiff reiterates her argument that service on July 12, 2024 was proper and therefore, the thirty-day clock began to run on that date. Reply at 3. Plaintiff points out that Defendant offered no evidence in support of its Opposition to show that it was not properly served on July 12, 2024 and did not argue as much. *Id.* Plaintiff further asserts that Defendant knew on July 12, 2024 that the case was removable based on the Statement of Damages included with the complaint, Defendant's knowledge of its own citizenship, and the incident report Plaintiff had submitted at the time of the accident reflecting her California address. *Id.* at 3-4. Plaintiff argues that even if Defendant did not know her domicile at the time of service, it learned that she resides in California no later than October 29, 2024, when her attorney served a demand package with at

least three medical bills stating her address. *Id.* at 4 (citing Yamada Decl., Ex. 6).

Plaintiff further contends it should be relieved of the stipulation due to mistake of fact. *Id.* at 5-6.

III. ANALYSIS

A. Legal Standards Governing Removal

A defendant may remove any civil action that could have been filed originally in federal court. 28 U.S.C. § 1441(a). To establish that a case is removable on the basis of diversity jurisdiction, the removing party must show (1) complete diversity between all properly served and joined parties, and (2) that the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a). When determining whether removal is proper under Section 1441, "any doubts as to the right of removal must be resolved in favor of remanding to state court." *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006) (quoting *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.1992) (per curiam)).

The time for removing an action to federal court is governed by 28 U.S.C. § 1446(b)(1), which provides:

> The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C.A. § 1446(b)(1). Notwithstanding the words "service or otherwise" in Section 1446(b), the Supreme Court has held that mere receipt of a copy of the complaint is not sufficient to start the thirty-day clock running. *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 356 (1999). The *Murphy* Court found that in enacting Section 1446(b), Congress did not intend to abrogate "the necessity for something as fundamental as service of process." *Id.* at 355 (quoting *Silva v. Madison*, 69 F.3d 1368, 1376–1377 (7th Cir. 1995)). The Court observed that "the so-called 'receipt rule'—starting the time to remove on receipt of a copy of the complaint, however informally, despite the absence of any formal service—could . . . operate with notable unfairness to individuals and entities in foreign nations." *Id.* at 356.

However, the "thirty-day time period [for removal] . . . starts to run from defendant's receipt of the initial pleading only when that pleading affirmatively reveals on its face" the facts necessary for federal court jurisdiction." *Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 690–91 (9th Cir. 2005) (citation omitted). Thus, "notice of removability under § 1446(b) is determined through examination of the four corners of the applicable pleadings, not through subjective knowledge or a duty to make further inquiry." *Id.* at 694. If it is not apparent from the face of the complaint that the case is removable, "the thirty-day clock doesn't begin ticking until a defendant receives 'a copy of an amended pleading, motion, order or other paper' from which it can determine that the case is removable." *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) (quoting 28 U.S.C. § 1446(b)).

B. Discussion

While the parties disagree about whether the initial service of the complaint, on July 12, 2024, was proper, there is no dispute that at least as of October 30, 2024, when Neiman Marcus Group signed the Notice of Acknowledgment and Receipt, the correct defendant had been properly served.[3] Neiman Marcus group also conceded at the hearing that by October 29, 2024, it was on notice of Plaintiff's California address and that the amount in controversy was over $75,000 and therefore knew that the requirements for diversity jurisdiction were met no later than that date. Therefore, under the legal standards set forth above, the thirty-day clock for Neiman Marcus Group's removal began to run no later than October 30, 2024, giving rise to a deadline for removal of November 29, 2024, at the latest.

Defendant, however, contends the removal was timely under a theory of estoppel, claiming that it "reasonably relied on the parties' clear stipulation that Defendant's responsive pleading—including removal—was due on December 2, 2024." Opposition at 5. Yet Neiman Marcus Group concedes that there was no explicit agreement that the deadline for removal would be extended

[3] The Court does not decide whether service on July 12, 2024 was proper as it is unclear when the Neiman Marcus Group first understood that Plaintiff was suing that entity. As counsel for Neiman Marcus Group suggested at the motion hearing that she first understood this when she spoke to Plaintiff's counsel, in mid or late October, the Court cannot say for sure that the naming of the wrong Neiman Marcus entities in the original summons was a harmless error that should be overlooked under California law.

and that in fact, that issue was never discussed. It appears that Neiman Marcus Group assumed that a stipulation extending the time to respond to the complaint also extended the removal deadline, but district courts in the Ninth Circuit have reached the opposite conclusion.

In *Transport Indemnity Co. v. Financial Trust Company*, the court found that "the thirty-day period may not be enlarged by . . . mere consent of the Plaintiff to extend the time for removal." 339 F. Supp. 405, 407 (C.D. Cal. 1972) (citing *Green v. Zuck*, 133 F.Supp. 436 (S.D.N.Y.1965); *Dutton v. Moody*, 104 F.Supp. 838 (S.D.N.Y.1952); *Robinson v. La Chance*, 209 F.Supp. 845 (D.C.N.C.1962)). It recognized, however, that "certain conduct on the part of the Plaintiff, which conduct is sometimes referred to as 'waiver' and sometimes referred to as 'estoppel', does preclude the Plaintiff from objecting to a late removal petition." *Id.* (citations omitted). But a finding of waiver or estoppel must be supported by "affirmative conduct or unequivocal assent of a sort which would render it offensive to fundamental principles of fairness to remand." *Id* at 408 (citation omitted).

The facts in *Transport Indemnity we*re similar to the facts here:

> Defendants, in pressing a claim that Plaintiffs are estopped to object to their removal of the case, rely on a pre-removal stipulation between counsel. The stipulation was negotiated by telephone and is evidenced by two letters, one from Plaintiffs' counsel to Defendants' counsel dated November 3, 1971, and the other from Defendants' counsel to Plaintiffs' counsel dated November 15, 1971. The stipulation as embodied in these documents is the usual form of stipulation used in the State Courts whereby one counsel grants to his opponent an extension of time in which to "move, answer or otherwise respond." Such an extension was originally granted on November 3, 1971, to expire January 7, 1972. It was extended by the letter of November 15, 1971, to expire January 15, 1972. *Neither letter makes any reference to a possible removal of the case to the Federal Court. Neither counsel claims to have mentioned a possible removal to the Federal Court in the telephone conversations which preceded both letters*. Defendants' counsel nevertheless claim that they interpreted the stipulation to be an agreement by Plaintiffs' counsel that the latter would not object to a removal to the Federal Court if defense counsel later decided to remove the action.

Id. at 408 (emphasis added). The court concluded, based on these facts, that there was no agreement that the plaintiff would waive its right to object to removal based on timeliness, holding that "a stipulation merely to extend the time to move, answer or otherwise respond does not have the effect of authorizing or consenting to jurisdiction of the Federal Court under a later removal

which was untimely filed." *Id.* The court continued:

> One can imagine a case in which defense counsel, just prior to the end of the statutory thirty-day period, had made the determination to remove the case and, finding himself pressed for time, communicates that fact to Plaintiffs' counsel and obtains from Plaintiffs' counsel a specific agreement that the latter would not object to the removal petition on timeliness grounds if defense counsel was a few days late in filing it. That might well constitute a true estoppel because defense counsel has reasonably relied to his detriment on the representations of his opponent. But that is not the instant case. There was no such reliance. Any unilateral reliance by defense counsel was unreasonable.

Id. at 408-409.

Other courts have reached the same conclusion. *See, e.g., Gooss v. GEICO Cas. Co.*, No. 2:13-CV-01364-GMN, 2014 WL 201613, at *2 (D. Nev. Jan. 16, 2014) (finding "[b]ased on the language of the letter from Plaintiff's counsel granting GEICO 'an extension to answer the complaint,'" that there was no agreement "to extend the deadline for filing a notice of removal" and observing that "even if Plaintiff had intended to permit GEICO an extension to file its removal notice, such an agreement would not have extended the time limit"); *Littlefield v. Cont'l Cas. Co.*, 475 F. Supp. 887, 890 (C.D. Cal. 1979) ("The stipulation between the parties' attorneys to extend the time for Continental Casualty to respond to the complaint was not effective in and of itself to extend the deadline for removal, unless the Court were willing to construe it as a waiver by the plaintiff").

The Court finds the reasoning in *Transport Indemnity* to be persuasive and reaches the same conclusion here. The parties stipulated to an extension of the deadline to respond to the complaint; they did not enter into a stipulation extending the deadline to remove. In the absence of affirmative conduct on the part of Plaintiff on which Neiman Marcus Group relied to its detriment, such as an affirmative representation that she would not object to removal on the basis of timeliness if the removal occurred by December 2, 2024, the stipulation extending Neiman Marcus Group's deadline to respond to the complaint does not render its removal timely.

Finally, the Court rejects Plaintiff's request to set aside the stipulation on the basis of mistake. Plaintiff has cited no authority suggesting that a mistake as to the facts resulting from counsel's miscommunication (or lack of communication) with staff within the firm, or failure to

thoroughly review the file before entering into the stipulation, justifies setting aside a stipulation. Nor would such a result be proper given that Defendant reasonably relied on the stipulation in filing its response to the complaint.

IV. CONCLUSION

Because the deadline to remove was no later than November 29, 2024 and Neiman Marcus Group removed on December 2, 2024, the removal is untimely. Therefore, the Motion is GRANTED. This case shall be remanded to San Francisco Superior Court.

IT IS SO ORDERED.

Dated: February 19, 2025

JOSEPH C. SPERO
United States Magistrate Judge